



POLICE DEPARTMENT

June 25, 2010

MEMORANDUM FOR: Police Commissioner

Re: Police Officer John Shea
Tax Registry No. 907323
115 Precinct
Disciplinary Case No. 85110/09

The above-named member of the Department appeared before the Court on September 29, 2009 and March 9, 2010, charged with the following:

1. Said Police Officer John Shea, assigned to 115th Precinct, on or about and between June of 2007 and July 3, 2008, in [REDACTED] County, did wrongfully engage in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Officer did unlawfully use a hidden tape recorder to monitor the telephone conversations of Lisa Miller without her consent or knowledge.

P.G. 203-10, Page 1, Paragraph 5 PUBLIC CONTACT-PROHIBITED
CONDUCT

The Department was represented by Amy Avila, Esq., Department Advocate's Office, and the Respondent was represented by John Tynan, Esq.

The Respondent, through his counsel, entered a plea of Not Guilty. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

The Respondent is found Guilty as charged.

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called Sergeant Benedict Vitale and Lisa Miller as witnesses.

Sergeant Benedict Vitale

Vitale testified that he has been employed with the New York City Police Department for eight years. He is currently assigned to the Patrol Borough Queens North Investigations Unit and has been there for approximately three years. Vitale is an investigator and his duties are to investigate misconduct for the Department.

Vitale stated that he was familiar with the Respondent because he was assigned an investigation by the Internal Affairs Bureau (IAB) in regards to the Respondent. He was assigned the Respondent's case on August 4, 2008, in which it was alleged by his wife Lisa Miller that the Respondent was eavesdropping on her. Vitale stated that he spoke to Miller on August 12, 2008. He stated that, "[Miller] was cleaning the garage and she found a tape recorder in the garage that was hooked up to the telephone lines for the house. She also told him that she found a bunch of tapes that were labelled." Vitale agreed that at that point he conducted an investigation.

During the investigation, Vitale asked Miller for the tapes and the tape recorder but she stated that she had destroyed the recorder and refused to provide the tapes at that moment. Vitale stated that he believed she said that she did not want to give the tapes because "she didn't want her husband to be terminated from the Department." He also stated that he believed she had mentioned that the Respondent did not live with her.

Vitale stated that on December 10, 2008, he conducted an official Department interview of the Respondent. He testified that he inquired about the allegation of eavesdropping and the Respondent said that "he was tape recording his wife's conversations because he suspected that she was cheating on him and he acknowledged that when she discovered the tape recorder in the garage she confronted him with it at his parent's house." He acknowledged that he did not have a chance to see the tape recorder because Miller had "smashed" it on the ground at the Respondent's parents' house. There were no photographs of the recording device, either.

Vitale testified that from his investigation, the allegation against the Respondent was substantiated but the Respondent was not arrested. The Respondent was not arrested because the [REDACTED] County District Attorney's Office declined to prosecute based on Miller's refusal to cooperate with the investigation.

On cross-examination, Vitale testified that he identified a document that "was prepared by the Internal Affairs Bureau. The defendant signed a request to withdraw her complaint – the complainant, Ms. Miller signed a request to withdraw her complaint." (Respondent's Exhibit [RX] A) Vitale believed the document was done the same day of the initial complaint noting that Miller signed the document on August 5, 2008.

When asked why he had contacted Miller seven days later, on August 12, 2008 he stated, "That withdrawal statement was prepared by the Internal Affairs Bureau...our investigation was still open." He agreed that he did not see the tape recorder player or any tapes that were placed in the device. He further stated that he did not hear about anything that was allegedly in the tape recorder nor did he see where the tape recorder was allegedly set up. During the course of Vitale's investigation, he had asked Miller

once or twice for audio tapes but she refused. He believed Miller had told him that she had a divorce attorney.

On re-direct examination, Vitale testified that he sustained the allegation of eavesdropping due to the Respondent's admission during his official Department interview.

On re-cross examination, Vitale testified that the substantiation of the allegation was made on the totality of the circumstances, which were the allegation Miller made and the Respondent's admission. When asked, "But other than Shea's statements of, I guess you could say corroborated her allegation, there was no other evidence that was provided by her that made out this allegation?" He answered, "No, there is no physical evidence." When further asked, "Just his word?" He stated, "Yes."

Lisa Miller

Miller testified that [REDACTED]

[REDACTED]

Miller stated that she is soon to be the Respondents ex-wife, since they are in the process of a divorce. She married the Respondent in June, 2006, but he moved in with her at the address above approximately in 2000 or 2001. [REDACTED]. She stated that the Respondent moved out of the residence in July of 2008.

On July 3, 2008, Miller found out that the Respondent was recording her home telephone conversations. Since the Respondent had been hiding his cell phone, laptop, and wallet, she thought he was having an affair. Once he left the house, she searched the house for the laptop. In the garage, she saw a box, which she assumed contained the

laptop but when she opened it she found a recording device hooked up to the home telephone line.

She described the recording device as “a black rectangle recording device. It said either voice activated recording or sound activated recording device.” When asked, “So on the recording device itself it said --.” She answered, “Yes. Either voice activated recording device or sound activated recording device. It had some buttons on it. There was a cassette in it I believe running and there was wires connected to it to the phone jack, the phone line. In the box also some cassettes and some empty cassette boxes and a package that the cassettes had come in.”

Miller stated that there were approximately two or three cassettes but that there were also approximately six or seven empty cassette boxes. She stated she was still in possession of two cassettes. She explained that the recording device was approximately a foot by seven inches long. Miller further stated, “There were wires coming out of it. The device was next to my electrical panel in my house and there was a phone jack coming into the house so there was a wire directly going into the phone jack and there was another wire going – I’m not sure if it was a plug or whatever when I found it I just ripped the device and the wires and everything out. I was infuriated. I couldn’t believe it.”

She testified that the device appeared to be operating but she was not sure. Miller explained that she pressed the buttons to see if she could hear the recordings. She was sure the sound she heard out of the device was hers but could not understand the context because the device played the tape at a very fast pace. Miller was then shown two of the cassettes that she had recovered from the recording device. She stated that one of the

cassettes was inside the device and the other was outside. Miller explained that originally there were more cassettes. She grabbed all of them and shredded the inside film of a few of them. However, she realized she might need them some day and kept two.

Miller denied keeping the tapes that she destroyed and stated that she was so angry that she “bashed” the recording device with a sledge hammer. She cut all the wires and the reels of one of the cassettes with a pair of scissors. Then she put all the pieces in the box she found them in and took it to her mother-in-law’s house. She stated that the two cassettes are in the same condition now as they were when she first recovered them from the garage. She further stated that at first the tapes were in her possession and then at some point she put them in a safe deposit box. However, Miller did not recall the exact date she put them in the safety box or when she took them out.

Miller was asked to look at the cassette dated “6/28” and “7/7” (Department’s Exhibit [DX] 1 and 2).¹ She was further asked if the cassettes had that same date written on them when she found them. She stated, “Yes, it did.” She also recognized the handwriting as being the Respondent’s. Miller testified that when she found the recordings she destroyed them and put them back in the box that she had found them in. Then she went to her in-law’s house where the Respondent and her son were. Miller emptied the box in front of the Respondent’s feet and confronted him about the situation.

When asked if he answered, she stated, “Yes, he did. He told me I did not do it the whole time. And I said I can’t believe – I thought we were – cause a year prior we had a separation and he filed for – well, he went and retained an attorney and we had reconciled and I said, I can’t believe that I thought we were reconciling and this is what

¹ The Court played the tapes but could only determine some of the language and none of the voices because the speed of the tape distorted the clarity of the voices.

you have been doing the whole time. Taping me behind my back and he said, I didn't do it the whole time or I didn't do it everyday or something like that. And I said well, now I will go retain an attorney. Our marriage is over..." At that point she did not call the police because she hoped they would reconcile.

Miller acknowledged discussing the situation with a friend because she did not know what to do. She stated that at some point she contacted IAB and made a complaint. When she found out it was a Class E Felony, she withdrew the complaint because she did not want her son's father to go to prison and her son to grow up without a father. She further stated that she tried to take a picture of the device but was not successful with the picture because she did not know how to handle her phone.

Miller testified that the Respondent had lived with her for a couple of years and left in July of 2008 because of the incident. She stated that she was not sure when the devices was set up but agreed that the Respondent was living with her at the time. She explained that in 2007 there were two months in which the Respondent had moved out because they had separated. Miller agreed that her home address was the Respondent's legal address as well.

Miller stated that she did not give consent for her telephone calls to be recorded and monitored nor was she aware that they were being recorded. She further stated that to her knowledge none of the people she spoke to were aware that they were being monitored and recorded.

On cross-examination, Miller testified that she tried to listen to the tapes and was able to recognize her children's, friends', and her own voice. When asked if she gave the names of the people she recognized to the investigators or District Attorney's Office to

determine if anyone wanted to press charges, she stated, "No." Miller could not recall if she had spoken to a district attorney. Miller stated that she did not hear the Respondent's voice in the tapes. She explained that the Respondent would mainly use his cell phone and that she might have seen him on the house phone, but was not sure because she was not home all day.

Miller testified that from listening to the tapes she was not able to determine the dates, time of day, nor the substance of the conversations. She explained that she heard the tapes for a few seconds and fast forwarded to different parts. She agreed that in the few seconds she listened, she was able to recognize her friends' and children's voices. When asked if those were the tapes she destroyed, she stated, "No. The ones I have here." When further asked why she did not turn the tapes in before, she stated, "I answered before because I know it's a class E felony and he is part of my son and him in prison is not how I would like my son to grow up. I would like him to have a relationship with his father."

Miller agreed that she retained a lawyer for her divorce case. When asked if she ever spoke to her lawyer about this case, she stated, "I rather not answer that." She acknowledged not being aware of the statute of limitations on a felony offense in the State of New York. She agreed that she was present in court because she volunteered to show up and had received a subpoena to show up to court. When asked if she would have shown up if there was not a subpoena, she agreed she would have. She agreed being aware of the hearing prior to getting the subpoena because she was contacted by the Department Advocate's Office.

Miller stated that her divorce case is pending in court and she acknowledged not providing the tapes in court. She filed for divorce in July of 2008, after the incident, but was not sure when.

Miller acknowledged that she destroyed the tape recorder and could not recall if her phone service was damaged as a result. She admitted not checking the phone after pulling off the device nor have the phone company repair the phone. When asked if the tapes were the original copies and if those were the tapes found in the box, she stated, "Yes, they are." When further asked if anyone else had the tapes, Miller stated, "Myself, and that's it."

Miller testified that she did not give the tapes to her lawyer or IAB. She stated that she did not make any copies nor saved the empty shells of the other tapes. She said, "I broke them up and again gave them to John Shea." When asked, "Or you dumped them on the floor at John Shea's parent's house?" she stated, "Correct."

[Miller was re-called as a witness on March 9, 2010 and gave the following testimony.] Upon listening to the tape marked for identification as DX 1, Miller stated that the first voice was of her eight-year-old son, Jack, leaving a message on the home answering machine. She stated that her son's play date called to see what time he was coming over to play with him. Her voice could be heard as the automated message on the machine. Miller indicated that she has a real estate license. The next message was from a real estate agent from Little Bay Realty, who called to make an appointment on a listing that Miller had. Miller indicated that it was Mary, a secretary from her real estate office.

Miller acknowledged that she had listened to different parts of the contents of the tapes (DX 1 and DX 2), but not in their entirety. When asked for a description of the

conversations on the tapes, she stated that on one of the tapes, she spoke with her endocrinologist regarding her lab results. On another section of the tape, she had a conversation with her aunt. She had several conversations with her sister. She described them as "just general conversation, some private medical information, some work-related conversations with [her] realtor, real estate office, some conversations with [her] children and their friends, some conversations with [her] best friend about marital issues that [she] was having at the time." She stated that these were conversations between herself and friends or relatives "that were private, that were not meant to be heard by anybody else."

Miller stated that she was not aware that these conversations were being recorded.

Upon learning so, she said:

I felt totally violated. I felt betrayed by someone that I trusted and loved, my husband. My children felt very betrayed because they had looked up to [the Respondent] as a stepfather, and my one son had his first girlfriend, and he had intimate conversations with her on the phone. That was his first love, and he felt very violated that his private thoughts and feelings were heard by someone that they were not supposed to be shared with. It was supposed to be strictly between himself and his girlfriend.

When asked by the Court if those conversations were on the phone and on the recording, Miller indicated that they were. She said, "All of us just were appalled that we didn't have the right to have private conversations in our own home." She further stated that she did not know who else may have heard the tapes or with whom the Respondent may have shared the tapes. She said, "It was just not right."

On cross-examination, Miller stated that she believed that she discovered the tapes on July 3, 2008 but did not provide the physical tapes to a member of the Department until she came to this Court in September 2009, as a result of receiving a

subpoena. She stated that prior to that appearance in Court, she had made either the investigators or the Assistant Department Advocate aware that she was in possession of those tapes. She indicated that there was no time stamp on any of the recordings, but the Respondent handwrote the dates on the cassette cases of when they were being taped. She stated that they were "brand new tapes. There was a sleeve of brand new cartridges that they had come in and several empty cases as well. That is his handwriting, and he dated them." She did not believe that there was a year listed on the tapes.

Miller stated that she did not give those tapes to her divorce attorney nor to the District Attorney's Office, although she believed that she still had that option. When asked if she was currently under investigation by the [REDACTED] County District Attorney's Office, she responded, "I don't want to answer that question." When then asked if she was under investigation for acts involving dishonesty and theft at this time, she stated, "I am not going to answer that question." She stated that she also would not answer the following questions asked of her: whether she was being investigated by the [REDACTED] County District Attorney's Office for stealing and putting herself above the property rights of other individuals; whether she was currently out on bail; and whether she had any pending criminal matters in [REDACTED] County. She stated, "It's all irrelevant. I'm not on trial." She was reminded by the Court that she could choose to not answer the questions, but she could not decide their relevancy. Miller was then asked if she was currently under indictment in [REDACTED] County for theft of property from another individual, to which she responded, "I am not going to answer that question."

Miller believed that residential custody of their child in common had not been transferred to the Respondent at this time. She stated that she has physical custody of her

son for five days; on the two days that the Respondent is off from work, he has physical custody of their son. She said she was not sure who the court document lists as the physical guardian of the child, but she reiterated that he lives with Miller and visits the Respondent twice a week. When asked by this Court if she challenged the Court's decision regarding physical custody of her child, she responded, "Actually, right now I believe how it stands is neither of us has custody. It's all temporary." When asked by this Court again whether she or her lawyer objected to any decision the Judge made to physical custody of her child, Miller stated, "The Judge didn't make any decision. A stipulation was agreed upon between my attorney and my husband's attorney and law guardian." She explained that the stipulation was that her son would visit the Respondent on the two days a week that he was not working and would continue staying in her house.

Miller stated that the order was made on the last court date that she had, which she believed was January 15. She said that since the Respondent has been assigned to "desk duty," the dates in which he has visitations with his son has changed. She explained that in the stipulation, "it was on [the Respondent's] rotating days off that he would be given visitation, and they switched each week." Since he has been assigned to desk duty, he "now has permanent Fridays and Saturdays off" so his son stays with him Friday to Saturday.

When asked if the Respondent was placed on desk duty as a result of the allegation she made in December 2009 or January 2010 based on acts she alleged took place several months earlier, Miller said that no one confirmed with her why he was placed on desk duty. She further stated, "I know that he is an alcoholic, so I am not sure if that's because he did something that brought attention to himself, or he was tested by

the Police Department. His alcoholism is his own situation.” She acknowledged that, in November 2009, she made an allegation to the Department that the Respondent was drinking too much. She stated, “He has been drinking too much for the entire 10 years that I know him.” She denied making that allegation shortly after she was released from jail, stating that it was made before her release.

Miller acknowledged that she has made between five and ten allegations against the Respondent with the Department prior to the one made in December 2009. She said that, in those allegations, she had stated that he was an adulterer, an alcoholic, and a mentally and emotionally abusive person. She said that, at times, he has threatened her, but neither with his gun nor his fists. This occurred before their separation, but she did not report it to the police despite having known the Respondent for 11 years and making between five and ten allegations against him. She stated that she “did explain it to Internal Affairs, and they asked [her] if [she] was afraid for [her] safety, and [she] had said at that time [she] was not.” She stated that she believed she had made over a half dozen allegations against the Respondent.

Miller was asked if she was jailed for theft in December 2009, to which she responded, “I do not want to answer that question.” She denied that she was with her children when she was arrested for theft and indicated that she was alone at that time. When asked if she was alone at the time when she stole property, she stated, “I don’t want to answer that question, sir.” She also did not want to answer when asked how much she stole. Miller stated that she did not remember the month that she made the last allegation against the Respondent, but she believed it was in 2010. When asked if she made that allegation after she left jail, she responded, “I made many allegations before as

well.” She indicated that between 2008 and the current date, she had made between six and 10 allegations.

Miller explained that she made the allegation about “the illegal wire tape” in 2008, after she filed for divorce. She had contacted IAB but withdrew the complaint because “at the time [she] didn’t want [her] husband (the Respondent) to be prosecuted because [she] did not want [her] son’s father in jail.” When asked if the Respondent had ever been to jail, Miller stated, “I don’t know what he does now.” She indicated that she did not want to answer when asked how she explained to her children that she was in jail and if she explained it to them. She reiterated that she believed she made the last allegation against the Respondent in 2010.

On re-direct examination, Miller stated that she withdrew the complaint from IAB. After she had made the original complaint in 2008, two detectives spoke with her. She said, “I had thought about it and realized that it was a felony and that he would be prosecuted and go to jail, and that would not serve a good purpose for our son that we share together to have a father who is in jail, and I withdrew it at that time.” She stated that, in 2008, she signed a release from IAB indicating that she no longer wished for them to investigate the allegation. She agreed that she did so because she was trying to protect the Respondent.

On re-cross examination, she acknowledged that she made the complaint to IAB and not to the [REDACTED] County Police or the [REDACTED] County District Attorney’s Office. She agreed that she did not want her son to see his father in jail.

Miller stated that she was not sure if the allegations that led to her arrest in two separate counties were made by the Respondent.

The Respondent's Case

The Respondent testified in his own behalf.

The Respondent

The Respondent stated that he was appointed to the Department on February 28, 1994. After completing his training at the Police Academy, he was assigned to the 32 Precinct, where he remained for a little over a year. He was then assigned to the 30 Precinct, where he remained until 2002. Afterwards, he was assigned to the 115 Precinct. He stated that he has been on restricted duty status since January.

The Respondent said that he was in the process of getting divorced from Miller, whom he married in June, 2006. He had met Miller in July, 1999. He stated that they had one child together, a son who would be nine years old in April. At this time, the Respondent, Miller, and their son live in [REDACTED] which is in [REDACTED] County. The Respondent indicated that he has had residential custody of his son since December, 2009, but he and Miller have joint custody. He said that prior to December, 2009, there was no custody agreement, just an informal arrangement.

The Respondent stated that the custody agreement changed in December of 2009 when "there was an incident" in which he was not able to locate Miller because she was in jail. At the time, the Respondent and his son were on vacation. While they were on vacation, Miller had been arrested and the Respondent stated that he later discovered that this was the second time that she had been arrested. He said that he was not aware of the first time that she was arrested. When asked by the Court what she had been arrested for, the Respondent stated that it was for grand larceny on two separate occasions. When

then asked by the Court what she stole, the Respondent stated that he did not know the circumstances of the case but he did know that she was being prosecuted for one case in [REDACTED] County and the other in [REDACTED] County.

The Respondent stated that the last time that he and Miller separated and started the process of divorce was in July 2008. They no longer lived in the same residence as of July 3, 2008. Prior to that date, he stated that there was ongoing "marital discord" from the time that they had gotten married. Between June 2007 and July 2008, he and Miller lived in their house in [REDACTED]. He said that Miller currently lives in that house, which he had purchased and was living in when they were married.

The Respondent said that there came a time in June 2006 when he had concerns about what Miller was doing because "she was not home a lot. She was having affairs." In June 2006, he obtained a recorder and "put it on the phone." He described it as a black recorder that plugs into the telephone line and is powered by regular plugs in the wall. He said that he set up the recorder in the garage and turned it on, but did not access the tape afterwards. He explained that he thought it was a "good idea", but he did not have time to listen to the tape. He stated, "I kind of buried it in the garage. It just got to the point where I just, you know, she was going to do whatever she was going to do. The marriage deteriorated, and there was really no point in it."

The Respondent stated that after setting up the recorder, he retained possession of it on the day that Miller "threw [him] out" of the house. He said that she came to his mother's house with their son and threw the recorder at him. According to the Respondent, Miller "stormed" into the backyard, threw "a box with a bunch of broken

pieces in it,” yelled at him, and left. He did not recall what she said when she was yelling at him. He indicated that the box contained the broken pieces of the recorder.

The Court asked for a clarification of the date of June 2006, when the Respondent stated that he purchased the recorder, and the date of July 2007, which appears in the charge against the Respondent. The Respondent stated that there was a period of one year between the time that he set up the tape recorder and the time that Miller threw the broken recorder pieces at him. Therefore, he actually set up the recorder in June 2007. The incident in July 2008, in which Miller threw the box with the recorder pieces at him, “sealed the break” in his relationship with her.

The Respondent stated that since July 2008, Miller has made approximately five different allegations against him that resulted in him being named a subject in a Departmental investigation. He indicated, though, that this case is the only one where he received charges and specifications.

The Respondent said that he is in the process of getting a divorce and was scheduled to meet with a forensic psychologist the day after this trial to decide the custody of their son. He indicated that, at this time, Miller should be out on bail. He stated that he and Miller “don’t really speak at all.” He last spoke with her about four weeks prior. Miller had called him to ask what to pack for their son, whom he was taking skiing. The conversation lasted about two minutes and they spoke about ski clothes. He stated, “We have very minimal contact. I try to avoid any contact with her.”

On cross-examination, the Respondent acknowledged that he placed a recording device on the phone. He believed that it continuously recorded telephone conversations, but he did not know if it actually worked. He agreed that he had set up the recorder

because he and Miller were having problems in their marriage. He stated that he did so “just to satisfy myself that I knew she was having an affair.” He said that he did not think of just asking Miller if she was having an affair because she would not answer that.

The Respondent indicated that the recording device had wires coming out of it, one which plugged into the wall for electric power and another that went into the phone line. He acknowledged that the device was in the garage of his home. He stated, “I put that on there in 2006, and then it was buried in the garage in 2007.” He said that he left it in the garage and did not throw it out because he “actually forgot it was even there.” He said that his original intention was to record Miller’s telephone conversations but “it did not work out.” When asked if her telephone conversations were private, he responded, “I guess so.” He indicated that he was not an active participant in Miller’s private telephone conversations “all the time.” He said that he never informed Miller or any of the people that she was speaking with, including her friends and family, that their telephone conversations were being recorded. He indicated that he resided in the same home with Miller between June 2007 and July 2008, although not continuously.

The Respondent stated that he has been a member of the Department for 16 years. When asked if he was aware that telephone conversations are private, he responded, “I am aware now” but was not aware of that prior to being served with charges in this matter. He acknowledged that he had heard of warrants when he was in training and was aware that a warrant has to be obtained from a court in order to record private telephone conversations. When asked if he was aware that his conduct was illegal, he responded, “No, I was not.” He clarified that a warrant was required for a police investigation. He

agreed that he thought that he could listen in on any telephone conversation as long as it was his phone and in his home.

FINDINGS AND ANALYSIS

The Respondent is charged with conduct prejudicial to the Department in that he unlawfully used a hidden tape recorder to monitor the telephone conversations of Lisa Miller without her consent or knowledge.

The issue before this Court is not that any specific conversations were recorded; it is the act of installing a recording device to the telephone for the purpose of eavesdropping on the unsuspecting user(s) of that phone.

It is not in dispute that the Respondent wired a tape recording device to the telephone in his home so that he could monitor the telephone conversations of his wife. The Respondent forthrightly admitted at trial, that he placed a recording device on the phone.

The Respondent also admitted, during the Department's investigation that he attached the device to the telephone. According to Sergeant Vitale, the Respondent told him during his official Department interview that "he was tape recording his wife's conversations because he suspected that she was cheating on him and he acknowledged that when she discovered the tape recorder in the garage she confronted him with it at his parent's house."

The Respondent testified at trial that he became suspicious that his wife was "having affairs" and in June 2006 he obtained the recorder and "put it on the phone." He

described it as a black recorder that plugs into the telephone line and is powered by regular plugs in the wall. He stated that he "kind of buried it in the garage."

He indicated that he was not an active participant in Miller's private telephone conversations "all the time" and never informed Miller or any of the people that she was speaking with, including her family and friends, that their telephone conversations were being recorded.

Lisa Miller testified that in July 2008, she found a recording device in their garage that was connected to their telephone. She described it as a "black rectangle recording device" and was a "voice activated device." She also found a cassette tape in the device and several additional cassettes in a box near the device.

Miller admitted to destroying all but two of the tapes that she found. That in no way detracts from the fact that the Respondent wired a recording device to the telephone to listen to his wife's conversations without her knowledge or the knowledge of parties to whom she was speaking with.

Both the Respondent and Miller testified that Miller also smashed the recording device. She then confronted him at his mother's house and according to the Respondent Miller "stormed" into the backyard and threw "a box with a bunch of broken pieces in it," containing the broken pieces of the recorder, yelled at him and left.

Miller testified that when she listened to the tape she was able to identify the conversation of her eight-year old son, Jack, leaving a message on the home answering machine. She also identified the voice of a secretary from her real estate office. Additionally, she stated that on one of the tapes there was a conversation between her and her endocrinologist regarding her lab results. There were also several conversations

between her and her sister and friends and relatives “that were private, that were not meant to be heard by anybody else.” While this Court is mindful that the tapes ran at a high speed and distorted the voices, but some words could be understood and it is plausible that anyone who was a party to a conversation on the tapes could readily identify who was speaking and what they were speaking about.

While the Respondent was not charged with the crime of Eavesdropping under New York’s Penal Law Section 250.05, a Class E felony, his conduct clearly mirrors that offense and this is conduct prejudicial to this Department. Section 250.05 provides that “A person is guilty of eavesdropping when he unlawfully engages in wiretapping, mechanical overhearing of a conversation, or intercepting or accessing of an electronic communication.” Section 250.00 defines in relevant part “Wiretapping” as “the intentional overhearing or recording of telephonic or telegraphic communication by a person other than a sender or receiver thereof, without the consent of either the sender or receiver, by means of any instrument, device or equipment.”

The Respondent claimed that he thought he could listen in on telephone conversations because he did not believe at the time that such conversations were private and that he did not need a warrant to wiretap his phone because he thought he could listen in on such conversations as long as it was his phone and in his home.

In People of the State of New York, v. Lewis Lasher, 58 N.Y.2d 962 (1983) the Court found that under N.Y. Penal law section 250.00, “it was not unlawful to eavesdrop on telephone conversations with the consent of one of the parties to the conversation.” Here, neither Miller nor any of the people she spoke to on the phone consented to their conversations being wiretapped.

In the Matter of Grace Czop v. Roy E. Czop, 21 A.D.3d 958; N.Y.S.2d 63 (2005), the Court found that “Family Court should have permitted cross-examination of wife concerning her alleged installation of tape recording device on parties’ telephone line [their telephone line] in order to surreptitiously record husband’s telephone conversations since such conduct, if proved, constituted eavesdropping in violation of Penal Law section 250.05...”

It should be noted that there was no criminal prosecution in this case because Miller failed to cooperate with the District Attorney. Her testimony was that it was an “E” Felony and she did not want him to go to jail.

Accordingly, I find the Respondent Guilty as charged.

PENALTY

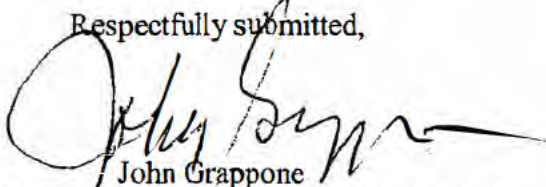
In order to determine an appropriate penalty, the Respondent’s service record was examined, see Matter of Pell v. Board of Education, 34 N.Y.2d 222 (1974).

The Respondent was appointed to the Department on February 28, 1994. Information from his personnel folder that was considered in making this penalty recommendation is contained in the attached confidential memorandum.

The Respondent has been found Guilty of the sole charge against him. The Department has recommended a penalty of forfeiture of 10 vacation days. This Court, in consideration of the fact that the Respondent’s conduct would have constituted a criminal offense, finds that the forfeiture of 10 vacation days is an inadequate penalty.

Based on the foregoing, I recommend that the Respondent forfeit a penalty of 25 vacation days.

Respectfully submitted,


John Grappone
Assistant Deputy Commissioner Trials

APPROVED

NOV 22 2011
RAYMOND V. KELLY
POLICE COMMISSIONER

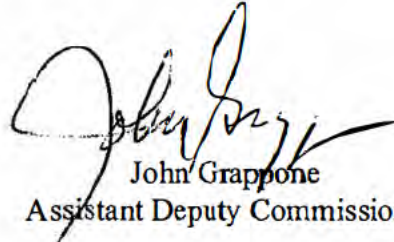
POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER JOHN SHEA
TAX REGISTRY NO. 907323
DISCIPLINARY CASE NO. 85110/09

The Respondent received an overall rating of 3.5 "Highly Competent/Competent" on his annual performance evaluation in 2006, 2007, and 2008. He has been awarded four medals for Excellent Police Duty and three for Meritorious Police Duty. [REDACTED]

[REDACTED] He has no prior formal disciplinary record. Based on his overall record, the Respondent was placed on Level-II Discipline Monitoring in June 2009.

For your consideration.



John Grappone
Assistant Deputy Commissioner – Trials